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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 215 October 2009

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I. Longshore and Harbor Workers' Compensation Act and Related Acts

A. U.S. Circuit Courts of Appeals[1]

***Pedroza v. BRB*, __ F.3d __, 2009 WL 3128075 (9th Cir. 2009).**

In a matter of first impression,[2] the Ninth Circuit held that, consistent with the "Marino-Sewell doctrine" developed by the Board, psychological injuries arising from legitimate personnel actions are not compensable under the LHWCA as "[s]uch injuries are not caused by working conditions and they are not work related." *See* 33 U.S.C. § 902(2).

Under the Marino-Sewell doctrine psychological injuries are compensable, if the claimant can demonstrate that they were caused by general working conditions and not legitimate personnel decisions. First, the court determined that the plain language and the legislative history of the LHWCA do not specifically address whether such injuries are work-related. Next, the court concluded that the Marino-Sewell doctrine is a reasonable interpretation of the LHWCA as "[s]uch injuries are not caused by working conditions and they are not work related." Further, this doctrine is in accord with the Act's underlying policy of providing compensation to injured

[1] Citations are generally omitted with the exception of particularly noteworthy or recent decisions.

[2] The Ninth Circuit previously reached the same conclusion in an unpublished decision in *Turner v. Todd Pacific Shipyards Corp*., 990 F.3d 1261, No. 91-70524 (9th Cir. Apr. 8, 1993) (table)(unpub.)

maritime workers while striking a balance between the workers and their employers. Such injuries were not intended to be compensable under the Act. A contrary interpretation would create a trap for the "unwary" employer and would encourage employers to terminate employees for poor performance, rather than first take legitimate personnel actions.

Claimant argued that the Board's interpretation of §2(2) is unreasonable because it differs from the majority of states' workers' compensation statutes as evidenced by several state legislatures enacting barriers similar to Marino-Sewell. The court concluded that this argument ignores the history of the LHWCA and that Congressional inaction is not a reliable guide to determine legislative intent. The court also rejected the claimant's contention that the Marino-Sewell doctrine violates the Act's policy of no fault liability. Rather, the doctrine refines the type of employment-related activities that could give rise to a claim. "Furthermore, the distinction that the Marino-Sewell doctrine creates between 'legitimate' or 'illegitimate' personnel actions is not about fault, it is about whether the employer's actions created an environment of poor working conditions to trigger psychological injuries." The court noted that the Marino-Sewell doctrine places a limit on the type of legitimate personnel actions that may not give rise to compensable injuries:

> "The Marino-Sewell modification strikes a balance between the employer and the employee. The Marino prong allows the employer to take personnel actions without fear of a workers' compensation claim due to a psychological injury from their actions. Meanwhile, the Sewell prong puts a limit on the type of legitimate personnel actions in which the employer may engage without fear of workers' compensation claims, because some personnel actions can facilitate poor working conditions that could trigger compensable work related psychological injuries such as 'harassment by her supervisor,' 'verbal accusations,' and 'physical harm.'"

[Topic 2.2 Injury—Arising Out Of Employment; Topic 2.2.18 Representative Injuries/Diseases—Psychological Problems; Topic 20.2.3 Occurrence of Accident Or Existence of Working Conditions Which Could Have Caused the Accident]

***G.R. v. Dir., OWCP*, No. 08-2317, 2009 WL 3157644 (4th Cir. Sept. 30, 2009).**

The Fourth Circuit summarily upheld the Board's decision affirming the ALJ's award of disability benefits for the reasons stated by the Board in *G.R.*

v. APM Terminals, Inc., BRB No. 08-0435 (Sept. 29, 2008)(unpub.). In *G.R.*, the Board affirmed the ALJ's finding that the employer established the availability of suitable alternate employment and that the claimant was thus limited to an award under the schedule. The Board further affirmed the ALJ's determination of the degree of claimant's permanent impairment, where the ALJ relied on the treating physician's opinion and the AMA *Guides* and also provided a moderate additional impairment rating for claimant's subjective complaints.

[Topic 8.3.1 Scheduled Awards—Some General Concepts; Topic 8.3.2 Permanent Partial Disability--Balancing or Weighing the Medical Ratings]

***Green-Brown v. Sealand Servs., Inc.*, __ F.3d __, No. 08-1236 (4th Cir. 2009).**

Reversing the Board and the ALJ, the Fourth Circuit held that §908(c)(13)(E) of the LHWCA mandates that hearing loss compensation be based on hearing loss determinations made in accordance with the AMA Guides. The court reversed the ALJ's determination of the compensation rate based on a 1987 audiogram, as it did not include a test at the 3000 hertz frequency required by the AMA Guides. The rate had to be based instead on a 2005 audiogram, the only one in the record that complied with the AMA Guides, even though it was administered eighteen years after the claimant's retirement.

The court concluded that Congress enacted §908(c)(13)(E) in 1984 to establish uniform standards for determining compensable hearing loss under the LHWCA. *See* Pub. L. No. 98-426, § 8, 98 Stat. 1639 (1984). This section was necessary because the absence of a "single formula [for evaluating] hearing loss claims" under the Act had led to "unpredictab[le] and nonuniform impairment determinations." 130 Cong. Rec. 25,906 (1984) (statement of Rep. Erlenborn). Thus, the purpose of § 908(c)(13)(E) is to ensure that "determinations of hearing loss will be grounded on a uniform external and professionally acceptable basis—the AMA Guides to the Evaluation of Permanent Impairment." *Id.* The AMA Guides are specified because they are "the most widely accepted medical standards and [Congress] wish[ed] to assure that determinations will always be in accordance with the most recently revised edition." H.R. Rep. No. 98-1027, at 28 (1984) (Conf. Rep.), *reprinted in* 1984 U.S.C.C.A.N. 2771, 2778.

Section 908(c)(13)(E) unequivocally mandates that determinations of hearing loss "shall be made" according to the AMA Guides. Both the current version of the AMA Guides and the one in effect at the time of the 1987

audiogram clearly require, *inter alia*, a test at the 3000 hertz frequency. Employer's medical expert acknowledged that it "gives a little better reflection of what the day to day disability might be."

The ALJ had concluded that an audiogram that did not comply with this requirement could still be used to determine hearing loss and compensation, and that the only qualification was that it could not be offered as "presumptive evidence" of the amount of hearing loss under §908(c)(13)(C). The court disagreed, stating that, notwithstanding subsection (C), §908(c)(13)(E) still mandates compliance with the AMA Guides; requirements found in both sections must be met in order for an audiogram to serve as "presumptive evidence" of hearing loss. *R.H. v. Bath Iron Works Corp.*, B.R.B. No. 07-0739, 2008 WL 899271, at *2 (Mar. 28, 2008).

B. U.S. District Courts

***Calderon v. Peederei Claus-Peter Offen GMBH & Co.*, No. 07-61022-CIV, 2009 WL 3242008 (S.D.Fla. Oct. 5, 2009).**

In this order denying defendant's motion to compel filed in a Section 905(b) case, the district court ruled that the photographs taken by plaintiff's attorneys are protected by the attorney work product doctrine. *See Gonnuscio v. Seabrand Shipping Ltd.*, No. 95-752-FR. 1997 WL 118436, at *1 (D.Or. Mar. 11, 1997) (holding that photographs of accident scene aboard vessel taken by attorney of injured seaman constituted attorney-client and work product material). The court further found that the defendant had not demonstrated that it has "substantial need of the materials in preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means." Fed.R.Civ.P. 26(b)(3) [the operative language of this Rule is identical to that in 29 C.F.R. §18.14(c)].

[Topic 19.3.6.2 Discovery]

***Sea Village Marina v. A 1980 Carlcraft Houseboat, Hull ID No. LMG37164M80D*, Civil Action No. 09-3292 (JBS-AMD), 2009 WL 3379923 (D.N.J. 2009).**

The district court held that it has subject matter jurisdiction in admiralty regarding a claim for enforcement of maritime liens against floating homes moored in a marina, based on the court's finding that the floating homes constituted vessels. The court concluded that the only precedent on point found similar crafts to be vessels, and that the homes at issue were not so permanently moored as to be stripped of that status.

To satisfy the definition of a vessel set forth in the United States Code, a craft must be "capable of being used as a means of transportation on water." 1 U.S.C. § 3; *see Stewart v. Dutra Const. Co.,* 543 U.S. 481, 488 (2005). "Often the thing being transported is not a shipment of goods or passengers but the superstructure itself, and the vessel need not have propulsion or steering-it need do little more than float, be seaworthy enough to be towed in the navigable waters, and have a superstructure." The craft's use as a means of transportation on water must be a "practical possibility." *Stewart,* 543 U.S. at 496. Every court to have considered the question has found floating homes to be vessels. To the extent that any state or private definitions of vessel purport to define the term for the purposes of the federal statute and conflict with the federal statute's definition, they would be pre-empted under the Supremacy Clause. Further, a craft's status as a vessel does not depend on whether it is currently certified by the Coast Guard.

A craft may, however, lose its status as a vessel if "the nature of its removal from active use for transportation has foreclosed the practical possibility of its future use for transportation." Federal courts only rarely find that a floating watercraft capable of being towed but presently moored has lost its status as a vessel, with the key factor being whether it is "permanently moored." "[T]he actual nature of the mooring-whether the connection to the shore is permanent or otherwise impractical to sever at short notice-is at the heart of what it means to be 'permanently moored' in a way that prevents the 'practical possibility' of transportation on water." The Fifth Circuit and, tentatively, the Seventh Circuit view the parties' intentions as a factor to be considered in resolving this question, while the Eleventh Circuit (and at least one district court) holds a contrary view; the Third Circuit has not yet decided the issue. Siding with the Eleventh Circuit, the court noted that this approach promotes uniformity and that "it would seem a rather odd definition of capable that would allow it to apply or not apply depending on mere plans and expectations, which are always subject to change." Here, the floating homes were not "permanently moored:" although they were tied to the dock at the marina with standard mooring lines, and connected to freshwater, waste water, and electrical systems, plaintiff's marine surveyor stated that all such connections could be easily removed without special tools.

***Nat'l Ass'n of Waterfront Employers v. Solis*, __ F.Supp.2d __, 2009 WL 3436913 (D.D.C. 2009).**

The D.C. District Court set aside, and enjoined enforcement of, the Rule instituted by the Chief Administrative Law Judge of the Department of Labor requiring ALJs to identify claimants by their initials only in decisions

and orders involving the Longshore Act and the Black Lung Act, on the ground that the Secretary did not engage in formal notice and comment rulemaking in accordance with the Administrative Procedure Act ("APA").

The Rule, declared by a memorandum of August 1, 2006, was instituted due to concerns about a claimant's privacy when ALJ orders and opinions are posted on the Internet. The plaintiff, National Association of Waterfront Employers ("NAWE") and Intervenors, a workers compensation insurer and an employer association, brought their claims under the APA, 5 U.S.C. § 706(2), contending that the Rule is "not in accordance with the law" because it violates the APA, the Freedom of Information Act, the Longshore Act, the Black Lung Act, the common law, and the First and Fifth Amendments to the U.S. Constitution. NAWE alleged that the Secretary did not identify interested third parties or balance their interests against claimants' interests, and did not consider a more narrowly tailored rule. NAWE asserted that its members need to know the identity of claimants for a variety of reasons, including the need to determine: whether benefits had been denied for the same or similar injury, whether it could obtain credit for compensation paid by a prior employer, and whether it may be entitled to "special fund" relief. Intervenors similarly asserted an interest in obtaining claimants' claims history for the purpose of timely investigating and defending claims. Because NAWE and one of the Intervenors publish newsletters, they also asserted that as members of the press they need to know the identity of claimants.

The court rejected the Secretary's contention that the Rule is merely procedural and, as such, is exempt from the notice and comment procedures under 5 U.S.C. § 553(b)(A). To determine whether a rule is substantive or procedural, courts examine whether the rule "encodes a substantive value judgment." Here, the Rule is substantive, because it "encodes a value judgment-the determination that, in *all* claims for benefits under the Longshore Act and the Black Lung Act, claimants' privacy interests trump any interest that the public or the press may have in access to the claims history of workers, as shown in ALJ decisions and orders." The court held that access to administrative records is favored by public policy and that this interest is substantive and, as such, entitled to APA protection. The court did not reach the issue of whether the interest in access to administrative decisions and orders presented here constitutes a right protected by the First Amendment or whether the Rule requiring the use of claimants' initials infringes on First Amendment rights.

With respect to the NAWE's and Intervenors' challenge to the Chief ALJ's authority to promulgate the Rule, the court found that the Secretary's delegation of authority to agency heads to administer websites did not

include the authority to institute the formal APA rulemaking that is required for substantive rules. The Rule is not a mere procedural or administrative rule regarding the formatting of documents on a website. The authority to engage in substantive rulemaking under the Longshore and Black Lung Acts rests with the OWCP.

***Butcher v. Dravo Corp.*, No. 01-1505, 2009 WL 3526580 (W.D.Pa. Oct. 23, 2009.)**

Butcher was employed by Price Inland ("Price") as a longshoreman when he was injured while unloading a barge that Price had contracted with Dravo Lime Company ("Dravo Lime") to unload. The court denied Price's motion for summary judgment on Dravo Lime's contractual indemnity claims against it. The court held that, contrary to Price's argument, an indemnity provision need not expressly reference the employer's LHWCA immunity in order to effectively waive such immunity under §5(a) of the LHWCA.

Based on the choice of law provision contained in the contract, Ohio law applied to the determination of the enforceability and terms of the indemnity provision, but only to the extent that it does not conflict with federal maritime law. Although under the Ohio workers' compensation statute only an express waiver of immunity is effective, the court found no support for extrapolating this requirement to indemnity contracts in the LHWCA context. Here, Butcher received only LHWCA benefits. Thus, since Price did not pay Butcher any benefits under the Ohio workers' compensation laws, the statutory and constitutional immunity that derives therefrom was not implicated. Unlike Ohio law, the LHWCA does not contain any such restrictions. To the extent that Ohio law appears to conflict with federal maritime law on this issue, it must give way. Thus, under federal maritime law, there is no requirement that the indemnity provision contain specific language waiving the employer's immunity from suit under the LHWCA.

Section 5(a) prohibits claims for tort-based contribution or indemnity against the employer, once the employer has paid LHWCA benefits to the injured employee. However, a stevedore employer who has paid LHWCA benefits may waive its immunity under §5(a) by entering into an indemnity agreement, either expressly or by implication, with a third-party other than a vessel owner. Here, Price has expressly contracted with Dravo Lime, a non-vessel, to indemnify Dravo Lime, and by doing so, has waived its immunity under §5(a). No magic words are required to waive the employer's LHWCA immunity, as it is the act of entering into the express contract with the non-vessel third party that effectively waives the immunity.

The court further concluded that, pursuant to Ohio law, the indemnity clause included claims by Price's own employees. The court declined to narrowly construe the terms of the provision on the ground that both Price and Dravo Lime are commercial entities which are presumed to possess a sufficient degree of sophistication regarding contracts, and each appeared to possess the financial ability to provide against loss by insurance or other means.

[Topic 5.2.2 Third Party Liability – Indemnification]

***Collick v. Weeks Marine*, Civil Action No. 08-5120 (MLC), 2009 WL 3615025 (D.N.J.)(Oct. 28, 2009).**

In granting Collick's motion to preliminarily enjoin Weeks Marine from failing to pay him "maintenance and cure" under general maritime law, the court concluded that Collick established a reasonable probability of success in showing that he is a seaman under general maritime law (the court noted that the Supreme Court has defined "seaman" for Jones Act purposes by examining the meaning of the term under general maritime law.) In granting injunctive relief, the court made the following preliminary findings.

Collick, a marine construction worker, worked for Weeks in the construction of a pier and was typically assigned to a particular crane barge, Barge 572, as a dockbuilder. In the month preceding the accident, Collick was assigned to Barge 572, along with five other workers. The mission of Barge 572 was supporting and conducting construction of the pier. Although Barge 572 was typically "spudded down" to the ocean floor, the dockbuilders frequently assisted in moving it.

With respect to the first prong of the seaman test, the plaintiff has established a reasonable probability of success in showing that he performed work in furtherance of the vessel's mission of constructing the pier, as he drove piles from, cut piles from, and prepared construction work on Barge 572. Construction of a pier two miles from shore is maritime in nature as it cannot be done on land, as evidenced by the fact that Weeks engaged a fleet of over twenty vessels at the construction site each workday.

Turning to the second prong of the seaman test, the court found that the plaintiff has shown a reasonable probability of success in showing that his connection to Barge 572 was substantial in both duration and nature. Superintendent Mowers contended that 90% of Collick's work occurred on the pier, while Collick asserted that he performed 75% of his work on Barge 572. Mowers' contention was unsupported by the record. Rather, the court

preliminarily found that Collick spent a substantial amount of time physically on Barge 572 itself, based on his explanation of the many uses of Barge 572 for the crew, e.g., changing into clothing, eating lunch, and performing various job duties, as well as based on his own firsthand knowledge of the conditions of his employment. He had worked on Barge 572 for at least one month prior to the accident, and the court concluded that the duration of this assignment is substantial. Additionally, Collick expected his employment to last through the completion of construction but for his injury. The court further found that Collick spent substantial portion of time each day working in the service of the crane barge, based on his description of his work day, the fact that he was regularly and consistently assigned to work on a particular crane barge, and the nature of his duties.

[Topic 1.4 LHWCA v. Jones Act; Topic 1.4.2 Master/member of the Crew (seaman); Topic 1.4.4 Attachment to Vessel]

***Hammonds v. Lennep*, Civil Action No. 1:09CV642-LG-RHW, 2009 WL 3418546 (S.D.Miss.)(Oct. 20, 2009).**

The court dismiss Hammands' claims, without prejudice, pursuant to Rule 12(b)(6) based on the failure to state a claim upon which relief can be granted. Hammonds had filed a claim under the LHWCA based on foot and back injuries allegedly sustained during his employment with Northrop Grumman. Thereafter, the parties to the claim filed a Joint Motion to Remand with Binding Stipulations (referred to by the court as the "settlement agreement"), agreeing that Northrop Grumman would continue to pay Hammonds' past and future medical expenses pursuant to Section 7 of the LHWCA. Northrop Grumman is self-insured for compensation purposes, and FARA serves as its third party administrator for compensation claims. Lennep is the FARA employee assigned to handle Hammonds' claim.

In his present lawsuit, Hammonds alleged that Lennep repeatedly failed to respond to his requests for a back surgery recommended by his treating physician. Hammonds asserted that Lennep and FARA thereby breached the settlement agreement, acted with negligence and gross negligence in handling his request for pre-approval of the surgery, and failed to reasonably investigate his claim.

After reviewing the settlement agreement, the court found that FARA was not a party to the agreement. Furthermore, there was no evidence that FARA was a party to any agreement entered with Hammonds or for the benefit of Hammonds. Accordingly, the court dismissed the breach of contract claim against FARA. The court further found that Hammonds' negligence, gross negligence, and failure to investigate claims against

Lennep and FARA were barred by the exclusivity provision of the LHWCA. 33 U.S.C. § 905(a). The LHWCA impliedly grants the employer's insurance carrier and third party administrator the same immunity that it grants to the employer and co-employees.

[Topic 8.10.1 Section 8(i) settlements – Generally]

C. Benefits Review Board

There have been no published Board decisions under the LHWCA in October 2009.

II. Black Lung Benefits Act

A. United States District Court

In *National Assoc. of Waterfront Employers v. Solis*, ___ F.Supp.2d ___, 2009 WL 3436913 (D.D.C. Oct. 27, 2009), the district judge held that the "Rule requiring the use of claimants' initials in ALJ decisions and orders under the Longshore Act and the Black Lung Act will be set aside and its enforcement will be enjoined."

[**use of claimants' initials in final decisions**]

In *Itmann Coal Co. v. Scalf*, ___ F.Supp.2d ___, 2009 WL 3300260 (S.D.W. Va. Oct. 15, 2009), the district court dismissed Employer's petition, under 33 U.S.C. § 927(b), for judicial enforcement of an order directing Claimant's repayment of an overpayment of black lung benefits. Notably, the District Director found that Claimant received state black lung benefits and was overpaid $50,913.60 in federal benefits by Employer. As a result, the District Director issued a "Certification of Facts", which Employer attached to its petition for judicial enforcement.

The district court held that it did not have subject matter jurisdiction to order repayment of the overpaid black lung benefits. Specifically, the court found:

> Section 927(b) requires the federal agency to 'certify the facts *to the district court*.' This places responsibility of seeking enforcement of the administrative order on the relevant administrative agency, not the parties. While Itmann certainly has a stake in the matter—it claims to be owed over $50,000—§ 927(b) appears concerned with providing a mechanism by which a federal agency can ensure that its rulings are complied with

> through judicial action. In this case, the only entity with such an interest is the DOL. The statute is silent regarding private enforcement. There is no indication that Congress intended § 927(b) to create an army of private attorneys general to enforce administrative orders.

Id (italics in original).

[**enforcement proceedings under 33 U.S.C. § 927(b)**]

B. Benefits Review Board

By unpublished decision, *N.E. v. Elk Run Coal Co.*, BRB No. 08-0454 BLA (Sept. 21, 2009), the Board noted that, under 20 C.F.R. § 725.309(d)(5), "no benefits may be paid (in a subsequent claim) for any period prior to the date upon which the order denying the prior claim became final." Under the facts of the claim, the Board affirmed the denial of the miner's prior claim on February 7, 2005. The Director, OWCP argued that, pursuant to 20 C.F.R. § 802.406, the Board's decision became "final" for entitlement purposes on April 8, 2005, which was the sixtieth day following issuance of the Board's decision during which an aggrieved party may file an appeal to the circuit court.

The Board disagreed with the Director's position and stated the following:

> We disagree because, under 20 C.F.R. § 802.406, where no appeal is filed, the Board's decision becomes final after sixty days, and the finality relates back to the date upon which the Board's decision was issued and became effective. (citation omitted). In other words, after sixty days the Board's decision becomes final because the time in which review could have been sought has passed. However, where no appeal is filed, that sixty days is not part of the time period 'encompassed by the prior claim' for entitlement date purposes; rather, it was the time period in which claimant could have, but did not, file an appeal that would have prevented the Board's decision denying the claim from becoming final. Because claimant did not appeal the Board's decision, it became final. And since no appeal was filed, the issuance, effectiveness, and finality of the Board's decision are one and the same for entitlement date purposes, that is, February 7, 2005.

Slip op. at 3.

[**date of onset in a subsequent claim**]